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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 245

SOUTHERN CALIFORNIA FREIGHT LINES,
a corporation,

Petitioner,

vs.

CHARLES T. McKEOWN,

Respondent.

PETITION FOR REHEARING.

HUGH GORDON,
Citizens Nat'l Bank Bldg.,
Los Angeles, California;

H. J. BISCHOFF,
1230 Bank of America Bldg.,
San Diego, California,

Counsel for Petitioner.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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PETITION FOR REHEARING.

Petitioner, Southern California Freight Lines, respectfully prays for a rehearing and reversal of the order hereinbefore entered on the eighth day of October, 1945, denying its petition for a Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit, on the following grounds:

(1) The decision of the Circuit Court of Appeals for the Ninth Circuit is in conflict with decisions in other circuit courts on the quantity of employee's time devoted to interstate activity necessary to bring employees within the coverage of the Fair Labor Standards Act.

(2) It is also in conflict with the decision of this court in the case of *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, holding that

> "If a substantial part of an employee's activities related to goods whose movement in the channels of interstate commerce was established . . . he is covered by the Act."

(3) The meaning of "substantial part" as used by this court in the case of *Walling v. Jacksonville Paper Co., supra,* is so much in conflict that an authoritative decision in the case is a matter of great importance.

I.

The Circuit Court of Appeals for the Ninth Circuit declared that it was its view that the requirement of "substantial amount" is met if

> "The activities of the employee were not casual or spasmodic, but rather a continuous, regular and integral part of his everyday and everyweek business."

This Court also stated that it agreed with the opinion of the Tenth Circuit Court in *New Mexico Public Service v. Engel,* 145 F. (2d) 636, holding that it met the requirement of "substantial amount," although only 4% of the activities of the employee were in interstate commerce.[1]

Petitioner desires to call to this Court's attention decisions in other jurisdictions which have placed a definite and contrary interpretation upon the meaning of "substantial amount" in connection with coverage under the Fair Labor Standards Act. Before referring to such cases, petitioner wishes to point out that the research of its counsel has disclosed that the decisions of the Ninth and Tenth United States Circuit Courts are in conflict with the decisions of the other circuits.

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[1]"We agree with the opinion of the Tenth Circuit in *New Mexico Public Service v. Engel,* 145 F. (2d) 636, that an employee occupied in interstate commerce in an enterprise but 4 percent of which is in interstate and, as here, continuously engaged therein, is substantially engaged in commerce within the meaning of the Act. Appellee here so was substantially engaged." (R. 50-51.)

In the case of *Vogelpohl v. Lane Drug Co.*, 55 F. S. 564, decided June 12, 1944, the employees devoted approximately 5% of their time unloading merchandise from trucks and railroad cars from points outside of the State of Ohio. The remaining 95% of their time was devoted to strictly intrastate activity. The District Judge held that 5% did not constitute a substantial amount of the employees' time in interstate commerce. That Court expressed the opinion that it should be guided by the regulations of the Administrator of the Fair Labor Standards Act, and further stated that in the regulations of the Administrator 20% to 25% was determined as the percentage satisfying the word "substantial."[2]

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[2]*Vogelpohl v. Lane Drug Co.*, 55 F. S. 564, 6/12/44 (Ohio 6th Cir.) p. 565: "The plaintiff and intervening plaintiffs devoted approximately 5% of their time to unloading from trucks and railroad cars merchandise received from outside the State of Ohio, and in wrapping and labelling packages of merchandise to be shipped outside the State of Ohio."

"The remaining 95% of their time was devoted to checking the merchandise received, unwrapping, labeling and placing it on shelves, storing, checking, sorting, wrapping and loading the same, and filling orders for distribution to the defendant's various retail stores. From 12-18-38 to 6-30-38, the work week was 61 hours, and thereafter was 60 hours. . . ."

(P. 567.) "The court is of the opinion that this work in interstate commerce did not constitute a substantial part of the employee's time. In determining what is a substantial portion of an employee's time, this court is not without some guidance, even though there is not a great deal of authority. In various regulations of the Administrator, 20 to 25% appears to be the percentage determined upon as defining the word 'substantial' . . ." (Here appear examples of the Order.)

"In the case of *Anuchick v. Transamerican Freight Lines*, D. C. 46 F. S. 861, Judge Picard, while stating that he personally did not believe that 20% is a substantial part of 100%, nevertheless gave effect to these interpretations of the meaning of 'substantial' without determining just what is a substantial portion of an employee's time. I am of the opinion that, in this case, 5% or approximately 3 hours per week, devoted to work in interstate commerce does not constitute a substantial portion of the employee's time."

The foregoing case arose in the State of Ohio and is in the Sixth Circuit. A later case, decided May 7, 1945, by the Sixth Circuit Court is in harmony with this decision and is the case of *Crown Overall Mfg. Co. v. Walling.*

In the case of *Snyder v. John J. Casale,* 49 F. S. 926, decided March 5, 1942, the District Judge held that 10% was not substantial. This case arose in the State of New York which is in the Second Circuit Court of Appeals.

The case of *Zaharian et al. v. Brown Material,* reported in seven labor cases 64951, and decided October 1, 1943, holds that 7% is not enough. This case arose in the Ninth Circuit and obviously is in conflict with the decisions of that court.

In the case of *Berry v. 34 Irving Place Corp.,* 52 F. S. 875, the District Judge declared that the words "A substantial part" is not a phrase of mathematical precision. On this point the Judge stated as follows:

> " 'A substantial part' is not a phrase of mathematical precision. For the purposes under consideration, I think it is satisfied by less than 50%. I do not think that in the context in which it is used by the Supreme Court, 'substantial' means the same as when it is used in the phrase 'substantial performance of a contract.' I construe the language to mean the converse of 'insubstantial or immaterial.' See Schainman v. Dean, 24 F. (2) 475.[3] By such a standard,

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[3]"Under Bulk Sales Act (C. C. 3440) declaring that sale of stock of merchandise without recording notice thereof at least seven days before consummation of sale in county recorder's office, shall be conclusively presumed to be fraudulent and void as against vendor's existing creditors. The fact that purchase money de-

> I find that a substantial part of plaintiff's activities was in the production of goods for commerce."

In *Cody et al. v. Dossin's Food Products*, recently decided by the United States District Court, Eastern District of Michigan, on October 5, 1945, and reported in eight Wage and Hour Reports 899, it was held that 2.7% is not a sufficient sum to constitute a substantial part. This judge used the following language in his opinion:

> "What constitutes a substantial part of an employee's activities has not been defined and we find it unnecessary to define this question here. However, by no test can 2.7% be considered substantial."

The foregoing case arose in the State of Michigan and is, therefore, in the Second Circuit. In this same Circuit was a decision in the case of *Fleming v. Post*, 146 F. (2d) 441, decided on December 14, 1944, declaring that 20% was necessary to constitute substantial. On this point the court said, on page 443:

> "In determining whether a substantial portion of the building is occupied by tenants engaged in the production of goods for interstate commerce, we have adopted the measure of 20% suggested by the Administrator. See Callus v. 10 East 40th St. Bldg., Inc., 146 F. (2) 438. In fact, during the years 1938, 1940, 1941 and 1942, about 25% of the

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rived from such sale was paid to certain of bankrupt's creditors would of itself constitute no defense to trustee's action at law to recover the goods or their value under Bankruptcy Act."

"Finding that bankrupt's sale of merchandise worth $4000.00 out of a total stock of goods valued from $20,000.00 to $25,000.00 involved a 'substantial part' of the stock in trade within (C. C. 3440) . . . held warranted in view of fact that almost the entire stock was sold at about the same time in same manner."

building was occupied by tenants engaged in manufacturing goods for interstate commerce."

A very persuasive argument is contained in the dissenting opinion of Circuit Judge Sibley in the case of *North Shore Corp. v. Barnett*, 143 F. (2d) 172. In a footnote below we quote a portion of his opinion, beginning with page 177.[4]

The majority opinion in the case of *North Shore Corp. v. Barnett, supra*, did not hold that a "substantial amount" of activity in commerce on the part of the employee need not be established but decided that the law laid down in *Walling v. Jacksonville Paper Co.* was

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[4]The Act itself, in Sec. 13, excluded certain employments, etc. In only one case was attention given to a possible mixed employment, in excluding "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in interstate commerce." Performance is here made the test as between service in interstate and in intrastate commerce. *It is a logical and reasonable test, and would afford a fair test in all mixed employments.* This court, however, in *Fleming Adm'r v. Jacksonville Paper Co.*, 128 F. (2d) 395, 7, suggested that if "a substantial part" of the employee's mixed work was in interstate commerce it was enough. That language was repeated by the Supreme Court on review of the case, 317 U. S. 564. That may be said to be the judicial formula. After the decision of *Kirschbaum Co. v. Walling*, 316 U. S. 517, which applied the Act to the maintenance employees of the owner of a building whose tenant was using it wholly for the production of goods for commerce, the Administrator was confronted with the case of a building only partially used for such production. He applied the judicial formula of "substantial part" and by a rule published 10-17-42, directed that 20% should be considered substantial. When he had a case of mixed employment by trolley and bus carriers, exempt under Sec. 13(a), he on 3-6-44 applied the same ratio of 20%. We therefore have the legislative suggestion of preponderance, the judicial formula of substantial part, and the administration crystallization of 20% to choose between. But no choice need be made, because the fact findings are that the admixture of interstate commerce done was not extensive, nor even "substantial" and certainly nowhere near 20%.

not applicable to employees having to do with maintenance or operating instrumentalities of commerce.[5]

The *North Shore* case was relied upon by the Tenth Circuit in the case of *New Mexico Public Service v. Engel,* 145 F. (2d) 636. The later case, however, did not draw the line that Circuit Judge Lee attempted to draw in the case of *North Shore Corp. v. Barnett, supra.* Circuit Judge Lee contended that his opinion was in accord with the decision of this court in *Overstreet v. North Shore Corp.,* 318 U. S. 125. It is respectfully submitted that this conclusion of Circuit Judge Lee was incorrect, as was fully pointed out in the dissenting opinion of Circuit Judge Sibley.[6]

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[5]"The law as laid down in *Walling v. Jacksonville Paper Co., supra,* is applicable to that class of cases which deals with employees whose duties relate in part to interstate shipments. It is not applicable to that class of cases which deals with employees having to do with maintenance or operation of instrumentalities of commerce. Employees in the first class engage during the same work week in activities strictly intrastate in character. Employees in the second class of cases, as here, engage in the same type of activities throughout each work week." (*North Shore Corp. v. Barnett,* 143 F. (2d) 172.)

[6]"This, I think, is a serious misunderstanding of the *Overstreet* decision. The sole contention there was that the employer was not the carrier of interstate commerce, and therefore, as the court states it, 'their (the employees') activities are local and at most only affect commerce,' 318 U. S. 125, 128, 87 L. Ed. 656. There was no question as to the amount of interstate commerce done, *for the petition,* the court says, alleged: 'The toll road constitutes an integral part of the highway system of the U. S. . . . It is used extensively by persons and vehicles traveling between the island and points outside Florida in interstate commerce. Mail to and from other states as well as goods produced outside Florida and consigned to merchants on the island are transported over the toll road. . . . We think these allegations bring petitioners within the coverage of the Act and entitle them to recover if proved.' The Court then settled the contention made assuming *'extensive'* interstate transportation actually done, and held the work of the employees was close enough to that of transportation to be practically a part of it. It certainly did not say how much of a mixed employment must be in interstate commerce, in order to apply the Act; which is the present question."

In the case of *Walling v. Mutual Wholesale Food and Supply Co.*, 141 Fed. 331 (8th Cir.), the court made it very clear that the relative time devoted to intrastate and interstate activity must be established by the employee who seeks the benefits of the Act. On page 339 this Court said:

> "Since all of these four companies did intrastate business as well, it is necessary to examine as to which employees of each devoted *such substantial portion of their time and efforts* to this interstate business as to bring them within the Act." (Emphasis supplied.)

In the case of *Walling v. Peoples Packing Co.*, 132 F. (2d) 236, it was shown that the Peoples Packing Company owned and operated a packing plant at Oklahoma City, Oklahoma, at which it engaged in the slaughter of cattle and hogs and the manufacture of beef and pork products. The average number of employees was approximately forty-five, of which four to seven were employed in the slaughtering department. The output of the packing house consisted of edible meat and meat products which were sold in intrastate commerce and inedible by-products which were sold in interstate commerce. The employees in the slaughtering department devoted most of their time in the removal of hides and the inedible portions from the carcasses.[7]

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[7]"While the primary object of the work of the employees in the slaughtering department is to produce edible meat and meat products, the *major portion of their manual efforts* is exerted in the removal of the hides and the inedible portions from the carcasses, thereby producing valuable by-products." (*Walling v. Peoples Packing Co.*, 132 F. (2d) 236.)

The foregoing case was also relied upon by the Tenth Circuit in *New Mexico Public Service v. Engel, supra,* and clearly does not constitute authority for the decision reached by the Tenth Circuit in the foregoing case.

In the case of *Bracey v. Luray,* 138 Fed. 8 (4th Cir.) the Court held that it was not necessary to allocate the time between interstate and intrastate business, because it was practically all of defendant's business in interstate commerce and not merely 4%.[8]

II.

Although the Circuit Court of Appeals for the Ninth Circuit states that it is following the rule of this Court as laid down in *Walling v. Jacksonville Paper Co., supra,* it is actually following the erroneous holding of the Tenth Circuit in *New Mexico Public Service v. Engel, supra.* The Tenth Circuit lays down the rule that the volume or percentage of an employee's activity in interstate commerce is not the test and states that the test is whether the services the employee performs are essential to the movement of commerce and *not merely spasmodic and isolated.* It is inconceivable that this court would use the

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[8]"Since the plaintiffs were engaged in commerce within the meaning of the Act as to practically all of defendant's business, therefore, and not merely as to the 4% embraced in direct interstate sales, questions as to allocations of time between interstate and intrastate business need not be considered." *Bracey v. Luray,* 138 F. (2d) 8, 12.)

words "substantial part" if it was not using those words in a relative sense.[9]

This Court in *Kirschbaum v. Walling*, 316 U. S. 517, expressed what it considered the intent of Congress in enacting the Fair Labor Standards Act. The principles enunciated in that decision are inconsistent with the assumption of the trial court and the Ninth Circuit Court of Appeals that 7% constitutes a "substantial part" of 100%. The principles enunciated in the *Kirschbaum* case, *supra*, were again repeated by this court in the case of *10 East Fortieth Street Bldg., Inc. v. Callus et al*, decided June 11, 1945.

III.

Although this Court has shown that a "substantial part" of the employee's activity must be in interstate commerce to have the benefits of the Fair Labor Standards Act, there is no generally accepted definition of the term "substantial part". The Administrator of the Fair Labor Standards Act has prescribed the quantity of interstate commerce essential to meet the requirement of "substantial part." In most cases the Administrator has declared that 20%

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[9] "We cannot, therefore, indulge in the loose assumption that, when Congress adopts a new scheme for federal industrial regulation, it thereby deals with all situations falling within the general mischief which gave rise to the legislation. Such an assumption might be valid where remedy of the mischief is the concern of only a single unitary government. It cannot be accepted where the practicalities of federalism—or, more precisely, the underlying assumptions of our dual form of government and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits—cut across what might otherwise be the implied range of the legislation. Congress may choose, as it has chosen frequently in the past, to regulate only part of what it constitutionally can regulate, leaving to the states activities which, if isolated, are only local."

constitutes a "substantial part". In referring to these regulations, the Second Circuit Court of Appeals, in the case of *Callus v. 10 East Fortieth Street Bldg.*, 146 F. (2d) 438, said as follows:

> "The Wage and Hour Division has adopted a standard of 20% for determining whether a substantial portion of the building is devoted to production for interstate commerce. Release No. Pr.-19 (Rev.) (Nov. 19, 1943). Some quantitative standard is necessary. Interpretation of the Act by the Wage and Hour Division, especially when not taking the form of authorized regulations, are not decisive; but we have been admonished that they are 'entitled to great weight.' *U. S. v. American Trucking Assoc.*, 310 U. S. 534; *Skidman v. Swift & Co.* 65 S. Ct. 161. The Division's 20% standard seems to us a sensible one for the courts to adopt."

The Circuit Court of Appeals for the Ninth Circuit holds that "substantial amount" is the converse of "unsubstantial". It is submitted that to say this throws very little light on what this Court meant when it used the words "substantial amount." In *Overstreet v. North Shore Corp., supra*, this Court held a complaint good which alleged that the employees engaged in extensive activity in interstate commerce. It is submitted that quantitatively speaking, the word "extensive" is synonymous with "substantial".

We have heretofore referred to the dissenting opinion of Circuit Judge Sibley in the case of *North Shore Corp. v. Barnett, supra*, indicating that the words "substantial part" were used in a quantitative sense. The meaning of the word "substantial" in various statutes has been

before the courts. In the case of *Schainman v. D* 24 F. (2d) 475, it was held that a sale of a stock merchandise in the sum of $4000.00 was a "substa part" of $20,000.00 to $25,000.00, within the meanin Sec. 3440 of the Civil Code of the State of Califo (Bulk Sales Act). The Court concluded its opinio that connection by stating that it was warranted in fin that $4000.00 was a "substantial part" in view of fact that almost the entire stock was sold at about same time in the same manner.

The U. S. Revenue Laws contain the words "substa part" in connection with defining a bank. U. S. Cal. Sec. 104.[10] In interpreting these words the U. S. Ci Court of Appeals for the Fourth Circuit, in the cas *Magruder v. Safe Deposit Trust Co.* 121 F. (2d) decided as follows:

> "The word 'substantial' as used in a provisi Internal Revenue Act that losses from sale of tal assets by trust company, a substantial par whose business is receiving deposits, are not subject

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[10] "(a) As used in this section the term 'bank' means a bank or trust company incorporated and doing business under the laws of the United States, of any State or of any Territory, a substantial part of the business of which consists of receiving deposits and making loans and discounts, or of exercising fiduciary powers similar to those permitted to national banks under Section 11(k) of the Federal Reserve Act, 38 Stat. 262, as amended, and which is subject by law to supervision and examination by State, Territorial or Federal authority having supervision over banking institutions.

"(b) Bank shall be taxable in the same manner as other corporations, except that they shall not be subject to the surtax imposed by Section 14, and except that the normal tax imposed by Section 13 shall be at the rate of 15% instead of at the rates provided in such section."

to limitation of $2500.00, is used in a relative, rather than *in an absolute or arbitrary sense.*" (Emphasis supplied.)

We believe this Court used the words "substantial part" in a relative sense and that it must be shown that the amount of activity on the part of employee is considerable and extensive. We believe that a decision adopting the rule promulgated by the Administrator of the Wage and Hour Law would remove the conflict in interpretation, by the various courts, that now exists. Until this is determined prolific litigation will ensue, particularly in the territory presided over by the U. S. Circuit Court of Appeals for the Ninth Circuit. The 20% rule promulgated by the Administrator has been approved in the cases of *Callus v. 10 East Fortieth Street Bldg.*, 146 F. (2d) 438 (Second Circuit); *North Shore Corp. v. Barnett*, 143 F. (2d) 172 (dissenting opinion of J. Sibley, Fifth Circuit); *Vogelpohl v. Lane Drug Co.*, 55 F. S. 564 (Sixth Circuit); *Anuchick et al v. Transamerican Freight Lines*, 46 F. S. 861 (Michigan Second Circuit).

The Ninth Circuit Court quoted from *Walling v. Jacksonville Paper Co.*, as follows:

> "'If a substantial part of an employee's activities related to goods whose movement in the channels of interstate commerce was established by the test we have described, he is covered by the Act.'"

Thereafter, this Court made the following statement in its opinion:

> "This statement throws no light on what percentage of an employee's time in interstate commerce is unsubstantial."

In its opinion the Ninth Circuit conceded that employees whose activities merely affected interstate commerce were not covered by the Fair Labor Standards Act, and thereafter added the following words:

> "However, there seems no logical reason why there should be any difference in the substantiality of the amount of 'affecting of' or being 'in' commerce to bring employment under either act."

and concludes its opinion with the following:

> "We agree with the opinion of the Tenth Circuit In *New Mexico Public Service v. Engel,* 145 F. (2d) 636, that an employee occupied in interstate commerce in an enterprise but four percent of which is interstate and, as here, continuously engaged therein, is substantially engaged in commerce within the meaning of the Act. Appellee here so was substantially engaged."

Conclusion.

In conclusion petitioner respectfully contends that it has shown fully that the Circuit Court of Appeals for the Ninth Circuit has erred in its decision herein involving the important question of jurisdiction. That the decision is in conflict with the decisions in other Circuits on the same point. That in view of these conflicting decisions an interpretation of the words "substantial part" as used by this Court in *Walling v. Jacksonville Paper Co., supra,* is necessary. A denial of this petition and Writ of Certiorari will leave unsettled the rights of many employees and the liabilities of many employers.

Respectfully Submitted,

HUGH GORDON,
H. J. BISCHOFF,
Counsel for Petitioner.

Certificate.

We hereby certify that the foregoing petition for rehearing is not presented for the purpose of delay or vexation, but is, in the opinion of counsel well founded in law and proper to be filed herein.

HUGH GORDON,

H. J. BISCHOFF,

Counsel for Petitioner.

Service of the within and receipt of a copy thereof is hereby admitted this.....day of October, A. D. 1945.

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10-30-45—60